NO. 482.

IN THE

Supreme Court of the United States

TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error.

vs.

CLARA HILL, Defendant in Error.

ANSWER OF PETITIONER TO DEFENDANT IN ERROR'S MOTION TO AFFIRM OR DISMISS.

By making this reply we do not waive the right to have this case take its regular order of submission, or our brief on file.

We will make this short reply to the brief of Defendant in Error, insisting, however, that this case shall not be considered except that it be reached on regular assignment when we may be heard in an oral argument, which we regard in this case to be necessary. We do not in this short reply discuss the case fully, but rely upon our brief for that in connection with this.

FIRST POINT OF LAW.

(Assignment of Error No. 1.)

In reply to Defendant in Error's position and contention, we beg to show to the Court that the suit was originally instituted in Frio County and that the Texas & Pacific Railway filed no pleading until the case reached the United States District Court, when Defendant pleaded and adopted the answer of the International and Great Northern Railway Company, which Company pleaded, among other things, "if said suit is based upon the act approved March 13th, 1905, 29th Legislature, pages 29 and 30, then this Defendant says that said act of the Legislature had no application to cases of this kind and said act is void and inoperative for said purpose, or any other purpose as fixing or attempting to fix the venue of suit for injuries done to passengers by a foreign road. That said act does not clearly express in its caption such purpose and the word passengers only occurs in the caption where the damages 'of the transportation or contract in relation to the carriage of passengers or freight, baggage or other property et cetera,' and the word passenger only occurs in the body of the act in the fourth word of the first line, and never thereafter occurring in the body of said act, and said law is therefore void and of no force or effect either as an original act or as an amended act, since the same did not comply with the provisions of the law and the constitution as contained in Article 3 thereof, and the sections of said article prescribing and setting forth the manner in which original bills should be proposed and introduced, and the amendments of any law. Said act is in conflict if construed to fix venue in Frio County with Act 1901, p. 31." (Record, page 9.)

The answer of the Texas & Pacific Railway Company on the jurisdictional question is as follows:

"Now comes the Defendant, The Texas & Pacific Rail-

way Company, upon whose application joined in by the other Defendant, this cause was removed from the District Court of Frio County, Texas, to this Honorable Court, and respectfully alleges that in case the plea in abatement heretofore filed by the other Defendant herein be sustained, that thereupon this Defendant desires to and here now shows to the Court that it had no agent or representative in Frio County, Texas, when this cause of action accrued, nor when this suit was filed, and that its line of railway runs from Texarkana, via Marshall, Dallas, Fort Worth, Abilene, Big Springs on to El Paso, Texas, several hundred miles north of Frio County and that no part of its line traverses Frio County and that the action is alleged and the personal injury occasioned to have occurred in Cass County, Texas."

and further denies partnership. (Record, pages 18-19.)

It is not meeting the question as Defendant in Error has attempted to do by saying the plea of the Texas & Pacific Railway was conditional upon its being sustained on behalf of the International & Great Northern Railway Company. Even if that view should be taken, then the plea is available because the Court did in effect sustain the pleading and defense of the I. & G. N. Ry. Co. and dismiss it from the suit, **which at once revived the pleading of the Texas & Pacific,** if ever dormant, and was revived simultaneously by the ruling of the Court in dismissing the I. & G. N. Railway Co. from the cause, which was tantamount to sustaining the plea. Our contention is that the United States Circuit Court of Appeals was a Court of contemporaneous jurisdiction with that of the State Court and it had the same power of the State Court to pass upon the pleas of abatement as the State Court had. That the removal of the case from the State Court to the Federal Court was simply to give it a standing in the Federal Court and therefore all questions that could have been raised in the State Court were equally available in the Federal Court if timely presented, which was done in this case. Under the Texas statutes where a plea of

privilege is filed it does not dismiss the case but the case is ordered to be transferred to the proper county. See Revised Civil Statutes of Texas, to-wit:

> Art. 1833. Whenever a plea of privilege to the venue, to be sued in some other county than the county in which the suit is pending, shall be sustained, the Court shall order the venue to be changed to the proper Court of the county having jurisdiction of the parties and the cause; and the clerk shall make up a transcript of all the orders made in said cause, certifying thereto officially under the seal of the Court, and transmit the same, with the original papers in the cause, to the clerk of the Court to which the venue has been changed; provided, that nothing herein shall prevent an appeal from the judgment of the Court sustaining a plea of privilege. (Id.; Stevens v. Polk County, 123 S. W. 618; Harris Millinery Co. v. Bryan, 125 S. W. 999; Moorhouse v. King Land & Cattle Co., 139 S. W. 883.)

There is no such provision in the Federal law. For instance, El Paso is in a division of the Western Division of Texas and part of the Texas & Pacfic Railroad lines run through that county and if suit had been brought in that division of the district it would probably have been removable to the Western District because the conditions of jurisdiction would be presented. El Paso was not the domicile of the Texas & Pacific and it had no line of railway nor local agent in Frio County; its domicile was in Dallas County, Texas. Now, this Court could not transfer the case to either place, but the case being dismissed without prejudice, the Plaintiff would be left to her remedy to sue in the county where she was hurt in the Northern District of Texas, or in Dallas, Texas. The presumption is that she was living in Queen City, the home of her parents, being a single woman.

If, as stated by Defendant in Error, the removal of the case by the Plaintiff in Error invoked the jurisdiction of the Court to hear and determine the cause, it did indeed invoke its jurisdiction to pass upon the same questions of venue that the State

Court could pass on, preliminary to any trial. In other words, because a case is removed from the State Court where the Defendant filed no answer, the Defendant must be held to waive further irregularity existing prior to such removal involving pleas to the jurisdiction of the Court, pleas of privilege, etc. Such was never intended. The Federal Court could determine just as a State Court could, for it is the question raised here whether or not the suit was properly brought in Frio County, involving no question of removal which would estop a Plaintiff, and the two propositions are not analagous. The cases cited by counsel, as we understand it, involves the question as to when a party removes the case to the Federal Court that it could not be dismissed upon a motion to remand. In other words, the Texas & Pacific removed the case to the Federal Court and having done so it could not move to remand the effect of which would be to return to Frio County, but it could do so by pleading in abatement any plea it could below with like effect. We believe the Court will conclude, that Defendant in Error's statement is not a fair statement of the facts below.

We have fully discussed this question in our brief, to which we refer under the foregoing heading.

SECOND POINT OF LAW.

(Assignment of Error No. 2.)

We come now to the question of **excluding** jurors of high character because they have prejudice against **FAKE CASES.**

We insist in reply to contention of Defendant in Error that it was error in the Court to excuse competent jurors who had the requisite qualifications because of their prejudice against the class of faker litigants, the injury being shown by the action of the jury. Of course, in the Court's qualification and in the stenographer's certificate there is a statement that he did not

take all of the testimony. All of the testimony of Mr. Vance was not taken because the stenographer was not there. When he was called in Vance again testified to practically the same thing that he did before the stenographer got there, but he did take down every word of the testimony of Mr. Lentz and counsel knowing that fact ought not to make the statement that is made. The size of this verdict and the facts contained in the motion for new trial and the attack upon Dr. Dale's testimony before the jury, and the refusal of the Court to postpone it to give us an opportunity to be heard all show and tend to show the prejudice of the jury and that we did not get a fair trial, which we might have gotten if we had had Mr. Vance or Lentz, entirely different class of men. Counsel say the conduct of Mr. Thomas was perfectly proper; even the jurors did not think that, as some of them stated they did not consider certain data he had prepared on the outside to use on the jury. His qualification was a little remarkable as it has the sound of a lawyer's master hand, and he is a jeweler and not a lawyer. The affidavits made on the motion for new trial were entirely in accordance with the law and practice governing such cases in Texas and should have been filed and considered.

THIRD POINT OF LAW.

There is one thing we have never understood concerning the qualification of the Court to Bill No. 3, about which the Defendant in Error have so much to say in their brief on page 21, et seqr. The Court is made to say by its qualification of the Bill that the Court was not called upon to rule upon an application to postpone, which is directly in the face of the Record, which was made on the 15th day of May, 1913, which is as follows:

> "Now on this day came on to be heard before the Court, the motion of the Defendant, the Texas & Pacific Railway

> Company, to continue this cause for the term or to postpone the same to a later date of the present term for the reasons stated at length in said motion, and the same having been heard by the Court, and duly considered, it is the opinion of the Court that the said motion should be in all things overruled, and it is accordingly so ordered, to which ruling of the Court, the Defendant, Texas & Pacific Railway Company, in open Court excepted." (Record, p. 44.)

This order was written under the direction of the Court, or by the Clerk of the Court. We do not know who wrote it. We did not, and it expressly shows it was presented to the Court and the reasons for the application were presented at length therein, and referred to in paragraph XI of the motion for new trial, Record, pps. 71-72-73, and earnestly urged by us, which was filed June 12, 1913, and had been on record a long, long time before the Court made the qualification to this bill months afterward, to-wit, October 14th, 1913, and no single lisp of the Court or any one, that it was not presented to the Court until long afterwards when it appeared in the bill of exception months after.

FOURTH POINT OF LAW.

The only comment we make under this in reply to Defendant in Error's criticisms is to say that the charge referred to should be proximate **result** instead of proximate "cause," simply a clerical error too plain to be misunderstood or to be argued about before this High and Honorable Tribunal.

SEVENTH POINT OF LAW.

We think the seventh point of law presents a plain error, obviously so, and we can add very little to what we have already said on that subject. We wish, however, to put the question in

a more concrete form, that is to say it was error of the Court not to submit to the jury the question as to whether or not under the circumstances Clara Hill was guilty of contributory negligence in discharging doctors who were curing her, get on the train and travel to a remote part of the State, allow herself to be operated on by a doctor who had not treated her as Dr. Dale had.

The misconception of the Defendant in Error, in our opinion, as will be seen from the decision he relies on, arises and grows out of the fact that when a party is injured and seeks the advice of a doctor and follows his advice that she should not be responsible for any mistake of the doctor in performing an operation that was originaly caused by the act of the railroad. It was a question of fact in this case as to whether or not she received such injury, or made it necessary for her to be operated on and to whether or not she would have gotten well without the operation if she had continued the proper treatment which had been administered to her. The Court eliminated all questions of our defense by its charge and held that railroad **would be responsible whether she would have gotten well or not by any other treatment.**

The further reason of such rule is, to charge the party who is to suffer the operation, with ordinary care, not alone in selecting a surgeon to operate, but in exercising ordinary care in dismissing competent surgeons who were curing her to undergo a needless operation. The testimony of the Plaintiff in Error, Defendant, showed that she was not seriously injured; that no operation was necessary; that she was a neuresthenic and getting well. This was a sharp issue and the Court practically instructed the jury to find for the Plaintiff **for it did not make any difference whether she would get well or not.** Such a charge does not seem to be the part of logic or the enunciation of a correct legal principle, but arises more from a sympathetic nature and

the desire to give the whole benefit of any possible doubt to the poor girl, and therefore announced an unhealthy and unwise doctrine. Surely the railroad ought to have had the benefit of this issue before the jury.

ELEVENTH POINT OF LAW.

In replying to the Defendant in Error's argument we must insist that the law is not settled against our contention that the Appellate Court will not review the discretion of the Trial Court in refusing to grant a motion for new trial on the ground that the verdict is excessive.

The Defendant in Error says they are so confident they will not pursue this subject further. We insist that such is not the decisions of the Appellate Courts, as shown in the opinions of Mr. Taft on the subject and the authorities cited by us in our brief. We would be glad for this Court to read the opinion of Judge Taft in Felton vs. Spire, 79 Fed. Rep. 576. He says: "It is apparent from the foregoing that the view of the learned Judge at the Circuit expressed in the opinion on motion for a new trial that because the Court cannot direct a verdict one way it may not set aside the verdict the other way as against the weight of evidence as enormous." We refer you to pages 115 and 116 of our argument for the Texas Statute. **It is mandatory** on the part of the judge to set aside and to enter a remittitur where the judgment is excessive or require a new trial. The Courts for many years threw themselves behind the jury to escape the responsibility of remitting a judgment where it is excessive. The law comes in and says you shall remit if it is excessive and if the party is not willing to stand by a remittitur then you shall give a new trial. It is a plain error for the Court not to enter a remittitur in an excessive judgment, such as this is, and in the manner in which the jury themselves say it was given. So then, if the Federal Court will follow the

State practice it will hear the testimony and examine the affidavits of jurors as provided by Article 2021, Revised Statutes, as shown on page 113 of our brief. In this case affidavits were presented in connection with the motion for a new trial and considered by the Court below who hesitated a long time as to whether he would grant a new trial or remit the judgment, and finally ruled against us. If the Federal Court ignores the Texas Statute and the Texas practice and does not follow the State procedure, it is tantamount to saying that in the State Court one rule of law and procedure prevails in which the litigant has the right to invoke the powers of the State to secure, but when the case is transferred from the State Court to the Federal Court, having the same jurisdiction concurrently with the State Court to try the issues, the Federal procedure is such as to deny to the litigant a favorable right under the law of the land.

The United States Circuit Court of Appeals have expressed no opinion in writing in this case on this subject and therefore we have to assume that they overruled every contention made by us and overruled the question of going into the excessiveness of the verdict for the reasons given by the Court recently decided on the 9th day of December, 1914, in the case of J. T. Bigger et al vs. Railway, in which the Court says:

> "We find none of the assignments of error in this case well taken. With regard to excessive damages see Alpha Portland Cement Co. v. Curzi, 211 F. 580-587, and cases there cited.
>
> "The judgment of the District Court is AFFIRMED."

This case is on appeal also to this Honorable Court and involving some of the same questions involved in this case. Clearly the Court of Appeals thought that the verdict was excessive and felt it could not go into these questions, which we regard as a plain error of law.

We have not here undertaken to discuss all the errors assigned

in our brief for they are urged and insisted upon, but only enough to show this case should not be disposed of on Defendant in Error's motion, for this is no frivolous appeal nor made for delay. Your petitioner does not believe this case was fairly tried, as is shown by the awful judgment. If this Honorable Court grants the motion and proceeds to dispose of the case, without oral argument, we presume the Court will consider our printed brief on file herein, which we specially urge.

Respectfully submitted,

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